INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Question Presented	2
Statutes and Regulations Involved	2
Statement	2
Specification of Errors to be Urged	6
Reasons for Granting the Writ	6
Conclusion	12
Appendix—A	13
B	15

CITATIONS

Cases:

Commissioner of Internal Revenue v. W. H. Luquire B. Assn. Co., 102 F. (2d) 89, (C.C.A. 5th)	6
General Utilities & Operating Co. v. Helvering, 296 U. S. 200	8
Helvering v. Oregon Mut. Life Ins. Co., 311 U. S. 267	9
Helvering v. Rankin, 295 U. S. 123	8
Lamana-Panno-Fallo Ins. Co. v. Commissioner of Internal Revenue, 127 F. (2d) 56, (C.C.A. 5th)	7

Miscellaneous:

Cooley's Briefs on Insurance, 2nd Edition, pp. 29, 32-33	7
Couch Cyclopedia of Ins. Law, Vol. 1, Sec. 34	7
Revenue Acts of 1934 and 1936	2, 13
Treasury Regulations 94	2
Insurance Code of Michigan, Part III, c. 1, Subdivision Four, Sec. 14	2, 15

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. .....

C. P. A. COMPANY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The C. P. A. Company, a Michigan corporation, by its counsel, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above entitled case on February 17, 1943, affirming the decision of the United States Board of Tax Appeals (now The Tax Court of the United States).

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 76-85) is reported in 45 B.T.A. 365. The Circuit Court of Appeals affirmed the Board without opinion by order (R. 93) which is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 17, 1943 (R. 93). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Petitioner, operating under the insurance laws of the State of Michigan, is a "life insurance company" within the meaning of the Revenue Acts of 1934 and 1936, where more than 50% of its total reserve funds were held for the fulfillment of contracts insuring against the loss of life and against the loss of job on account of disability or old age.

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the Revenue Act of 1936 and Treasury Regulations 94 issued thereunder are set forth in Appendix A hereto. The corresponding provisions of the Revenue Act of 1934 and the Treasury Regulations issued thereunder are the same.

The pertinent provisions of the Michigan statutes are set forth in Appendix B hereto.

STATEMENT

The Petitioner, a corporation organized under the insurance laws of the State of Michigan, is and has been operating specifically under Part III, c. I, Subdivision Four, Section 14 of the Insurance Code of Michigan (Compiled Laws of Michigan, 1929, Section 12,402) (R. 76).

The purposes of the corporation set forth in its Articles of Incorporation, as amended July 17, 1923, are: (1) To insure railway employees against loss of position resulting from discharge or retirement; (2) To insure any person against bodily injury or death by accident, or against disability on account of sickness, and (3) To insure the lives and health of persons and every insurance pertaining thereto, and to grant, purchase or dispose of annuities (R. 77). The business of the Petitioner at all times here material was confined exclusively to issuing policies of insurance to railway employees (R. 45 and 77).

During the taxable years 1935 and 1936, the Petitioner had outstanding and in force nine types of insurance policies, of which all but three insured the owner against the loss of life and, in the case of four of them, also against the loss of job on account of disability or old age (R. 69, 77-78). The three policies providing no insurance against loss of life (Old Regular, Old Special, and No Age Limit) may be disregarded for the purposes of this case as the reserves applicable thereto are approximately only 10% of the total reserves held for the fulfillment of all policies (Exh. I and J, R. 69). 90% of the policies issued and outstanding during the taxable years insured the owner against the loss of life (R. 79). Three of the policies—Preferred (Exh. B, R. 53), Guarantee (Exh. C, R. 57), and New Special (Exh. D, R. 59)—alone constituted more than 60% of the outstanding policies both in number and in reserves (R. 69).

All the policies are based upon a single annual premium with privilege of payment in monthly installments (R. 78-79). The Preferred policy provides, in the event of natural death, for the payment to the beneficiary of a funeral benefit of $500.00 or of all premiums, whichever is greater, and, in the event of accidental death, for payment to the bene-

ficiary of $1,000.00, or the return of premiums, whichever is greater. The Guarantee policy provides, in the event of natural death, for payment to the beneficiary of all premiums, and, in the event of accidental death, for the payment of $2,000.00 to the beneficiary. The New Special policy provides, in the event of natural death, for the payment to the beneficiary of all premiums. All three policies provide, in addition to the foregoing death benefits, for the payment to the insured of varying amounts, dependent upon the length of time the policy has been in force, in the event of his being retired from his job on account of physical disability, or, having attained the age of sixty-five years, on account of old age (Exh. B, C and D—R. 53-57 and 59). Railroad employees are retired generally at the age of sixty-five or seventy years, unless earlier retired by reason of disability (R. 79).

The total reserves set up and maintained by the Petitioner against all outstanding policies at the beginning and at the end of each of the taxable years, and the mean of the reserve funds for each year, are as follows (R. 81-82):

	1935	1936
Beginning of year	$1,975,882.00	$2,167,663.00
End of year	2,167,663.00	2,399,430.50
Total	$4,143,545.00	$4,567,093.50
Mean	$2,071,772.50	$2,283,546.75

Of the reserves at December 31, 1935 and December 31, 1936, only $298,230.00 and $289,516.00, respectively, were for the Old Regular and Old Special policies which provided no insurance against the loss of life. No part of the reserves was held for the No Age Limit policy (R. 80-81).

The Petitioner computed its reserves on the basis of the

American Experience Table of Mortality, with an assumed rate of interest of 4% as required by the Department of Insurance of the State of Michigan (R. 81). The reserves maintained during the taxable years were held exclusively against the unaccrued and contingent liability under the policies for the death and retirement benefits therein provided. No part of the reserves was maintained against liability for any discharge benefits provided in the policies (R. 80).

The Commissioner of Insurance for the State of Michigan, in accordance with his established practice as to all insurance companies, made periodical examinations of the Petitioner's business and independent valuations of its outstanding policies, and determined that the reserves were adequate (R. 46, 70-75). The Commissioner of Insurance required the Petitioner to carry the reserves for both retirement and death risks, and has continued to require such reserves (R. 24-25, 39). The Petitioner filed its annual statement with the Commissioner of Insurance for the State of Michigan, as required by the laws of Michigan, on miscellaneous form provided by the Commissioner, because there was no special form strictly applicable to the Petitioner's business (R. 30, 35-36, 39-40).

The Board of Tax Appeals found, inferentially, that the Petitioner's policies are life insurance contracts, but concluded that the reserve funds for the fulfillment thereof are less than 50% of the total reserve funds (R. 82). The Board, stating in its opinion that the Petitioner did not issue contracts of "combined life, health and accident insurance" (R. 83), held that the Petitioner is not a "life insurance company" within the statutory definition solely on the ground that of the total reserve funds held for the fulfillment of all contracts for combined death and retire-

ment benefits, more than 50% was held against the retirement risk thereof (R. 85).

The Circuit Court of Appeals for the Sixth Circuit, without opinion, affirmed the decision of the Board of Tax Appeals on the ground that the contracts issued by the Petitioner were not life insurance contracts, and were not contracts of combined life, health, and accident insurance (R. 93).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the contracts issued by the Petitioner were not life insurance contracts, and were not contracts of combined life, health, and accident insurance.

2. In failing to hold that the contracts issued by the Petitioner are life insurance contracts, and/or contracts of combined life, health, and accident insurance, and that the reserve funds held for the fulfillment thereof comprise more than 50% of the Petitioner's total reserve funds.

3. In failing to hold that the Petitioner is a life insurance company within the meaning of the Revenue Acts and taxable only as such.

4. In affirming the decision of the United States Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals holding that the contracts issued by the Petitioner are not life insurance contracts is in conflict with *Commissioner of Internal Revenue v. W. H. Luquire B. Assn. Co.*, 102 F.

(2d) 89, (C. C. A. 5th) and *Lamana-Panno-Fallo Ins. Co. v. Commissioner of Internal Revenue,* 127 F. (2d) 56 (C. C. A. 5th) and is erroneous. In the *W. H. Luquire B. Assn. Co.* case, the taxpayer, pursuant to the purposes set forth in its Articles of Incorporation, issued certificates or policies of burial insurance. Similarly, in the *Lamana-Panno-Fallo Ins. Co. case,* the taxpayer was engaged in the business of issuing contracts of burial or funeral insurance. In both cases the Circuit Court of Appeals for the Fifth Circuit held that such contracts are contracts of life insurance.

In the instant case, the record shows that all the policies or contracts issued by the Petitioner, with the three minor exceptions noted, insured the owner against the loss of life. In four of the contracts, the insurance is for a funeral benefit in a stated amount, with provision in three of them for double indemnity in the event of accidental death (Exh. B, E, F and G—R. 53, 61, 63 and 65). In a fifth contract, the insurance is for the payment of a stated amount in the event of accidental death, with provision for repayment of premiums in the event of natural death (Exh. C—R. 57).

Such contracts clearly are life insurance contracts by every recognized and accepted definition of life insurance (See *Couch Cyclopedia of Insurance Law,* Vol. 1, Section 34; *Cooley's Briefs on Insurance,* 2nd Edition, pp. 29, 32-33), and are expressly recognized as such in Michigan. Under the Michigan Insurance Code, (Compiled Laws of Michigan, 1929, Section 12,456) every corporation issuing contracts for the payment of money to families or representatives of certificate or policyholders is deemed to be a life insurance company.

2. The holding of the Circuit Court of Appeals is based upon a misconception of the stipulated facts, and is contrary to the conclusion of the Board of Tax Appeals which found, inferentially, that the contracts issued by the Petioner are life insurance contracts. The Board did not find, as a fact, that the Petitioner's contracts are not contracts of combined life, health, and accident insurance. The statement to that effect, in its opinion, is clearly contrary to the stipulated facts as is also the like conclusion of the Circuit Court of Appeals.

The decision of the Circuit Court of Appeals thus based upon findings or conclusions of ultimate facts contrary to the findings of the Board and to the stipulated facts, is inconsistent and probably in conflict with the decisions of this Court in *General Utilities & Operating Co. v. Helvering,* 296 U. S. 200, and *Helvering v. Rankin,* 295 U. S. 123. In the *General Utilities & Operating Co. case,* the Court, quoting from its opinion in the *Rankin* case, said: (p. 1128)

> " 'The Court of Appeals is without power, on review of proceedings of the Board of Tax Appeals, to make any findings of fact. * * * The function of the court is to decide whether the correct rule of law was applied to the facts found; and whether there was substantial evidence before the Board to support the findings made. * * * If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board. * * * And the same procedure is appropriate even when the findings omitted by the Board might be supplied from examination of the record.' "

The Court then said: (p. 1128)

> "Here the court undertook to decide a question not properly raised. *Also it made an inference of fact directly in conflict with the stipulation of the parties and the findings, for which we think the record affords no support whatever.* To remand the cause for further findings would be futile. The Board could not properly find anything which would assist the Commissioner's cause." (Italics supplied).

In the instant case, all the facts pertaining to the nature of the Petitioner's policies or contracts were stipulated. It was not contended before the Board that the policies are not contracts of life insurance, and the Board found, inferentially, that they are contracts of life insurance, at least in part. The statement of the Board, in its opinion, that the Petitioner did not issue contracts of "combined life, health, and accident insurance" is not a finding of fact, but merely an argumentative observation which is contrary to the stipulated facts. The Board's decision is not based upon the character of the Petitioner's contracts, but solely upon the nature and adequacy of the reserves held for the fulfillment of such contracts. The Circuit Court of Appeals did not pass upon the question decided by the Board, and rested its decision solely upon a conclusion of fact at variance with the finding of the Board and with the stipulated facts.

3. The decision of the Circuit Court of Appeals, taken as an affirmance of the Board on the ground that the Petitioner's reserves are not of the character in sufficient amount to bring the Petitioner within the statutory definition of a life insurance company, is probably in conflict with the decision of this Court in *Helvering v. Oregon Mut. Life Ins. Co.*, 311 U. S. 267. In that case, the Commis-

sioner sought to disallow the deduction in respect of the reserves held against the disability features of combined life, health, and accident policies on the hypothesis that the statute allows the deduction only as to reserves for death losses. It appears that in the taxable years, the taxpayer's outstanding policies were about equally divided between disability contracts and those providing no disability benefits. (See opinion of the Circuit Court of Appeals in the same case, 112 F. (2d) 468-469). This Court, rejecting the contention of the Commissioner, said: (p. 1071)

> "It seems clear that Congress intended to permit the deduction of reserves based on those policies that make a company a 'life insurance company' under the Act, which, by definition, includes policies of 'combined life, health, and accident insurance.' The reserves here related to the disability provisions of such combined policies. The same underlying considerations that prompted the deduction for death reserves are applicable to the reserves for disability in these combined policies. And disability as well as death reserves fall literally within the language of the deduction provision."

This Court, in effect, held that for purposes of the statutory definition of a life insurance company, the disability reserves for combined life, health, and accident contracts must be included or grouped with the death or nondisability reserves. Indeed, the Circuit Court of Appeals in that case expressly so held. It said (112 F. (2d) 468, 470):

> "* * * For the purpose of classification, the disability reserves held against the combined policies are treated by the act as life insurance reserves * * *."

In the instant case, the stipulated facts show that approximately 90% of the Petitioner's policies insured against the loss of life and against the loss of job on account of disability or old age, and that both benefits are contained in one policy or contract. The insurance against the loss of job is, by the express terms of the policy, insurance against physical disability or advancing old age (over sixty-five years) resulting in the retirement of the insured by his employer. Such policies obviously are contracts of combined life, health, and accident insurance. The reserves held for the fulfillment of these combined contracts are nearly 90% of the total reserve funds of the Petitioner (R. 69).

4. The decision of the Circuit Court of Appeals results in a discriminatory application of the Revenue Laws to the great and serious, if not irreparable, damage of the Petitioner, and violates the clear intent of Congress. The Petitioner will be denied the classification for income tax purposes which is accorded other insurance companies engaged in the business principally of issuing like or analogous contracts. The Petitioner will be required to pay a tax on all premium receipts as income, notwithstanding it is required by State law to maintain a substantial, if not the major, part of such receipts as a reserve or trust fund for the benefit of policyholders, which is not available to the Petitioner for any other purpose.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari be granted.

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Dated: May 7, 1943.

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